Review Essay: Impact Fees, Exactions and *Paying For Growth In Hawaii*

by David L. Callies*

I. INTRODUCTION

Of the many issues and problems confronting local governments in these times of scarce public resources and monumental public needs, few have received as much attention recently as paying for public infrastructure[1] and providing for low- and moderate-income housing.[2] This is particularly true in "growth" states in "sunbelt" regions, such as California, Florida—and Hawaii. It is thus both timely and useful for the Land Use Research Foundation of Hawaii to have sponsored and published a major study on these very issues: *Paying for Growth in Hawaii: An Analysis of Impact Fees and Housing Exaction Programs*. While the study is written from a particular point of view—that of the land developer—it is a useful and timely contribution to the national debate on the subject[3] which is critical to Hawaii's future. If we accept that local

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* Professor of Law, William S. Richardson School of Law, University of Hawaii; A.B., DePauw University, 1965; J.D., University of Michigan, 1968; LL.M., Nottingham University (England) 1969. Chairman Section of Urban, State and Local Government Law, The American Bar Association.

[1] Bosselman & Stroud, *Legal Aspects of Development Exactions*, in DEVELOPMENT EXACTIONS (1987) [hereinafter Bosselman & Stroud, *Legal Aspects*]; T. SNYDER & M. STEGMAN, PAYING FOR GROWTH: USING DEVELOPMENT FEES TO FINANCE INFRASTRUCTURE (1986); Bosselman & Stroud, *Pariah to Paragon: Developer Exactions in Florida 1975-85*, 14 STETSON L. REV. 527 (1985); Callies, *Property Rights: Are There Any Left?*, 20 URB. LAW. 597 (1988) [hereinafter Callies, *Property Rights*]; *Symposium: Development Impact Fees*, 54 J. AM. PLAN. A. 3-78 (1988); *Exactions: A Controversial New Source for Municipal Funds*, 50 LAW & CONTEMP. PROBS. 1-194 (1987); *Symposium: Linkage Fee Programs*, 54 J. AM. PLAN. A. 197-224 (1988); Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515 (1988).

[2] Bosselman & Stroud, *Mandatory Tithes: The Legality of Land Development Linkages*, 9 NOVA L.J. 381 (1985) [hereinafter Bosselman & Stroud, *Land Development Linkages*]; Kayden & Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 127 (1987).

[3] Andrew & Merriam, *Defensible Linkage*, 54 J. AM. PLAN. A. 199 (1988); Kayden & Pollard, *supra* note 2; Nelson, *Downtown Office Development and Housing Linkage Fees*, 54 J. AM. PLAN. A.

government can no longer afford the costs of development associated with providing new roads, parks, schools, water and sewer lines, and so forth, how will these be provided? Although housing is not such a "public facility" it is an important public need in Hawaii and other parts of the country. Can government force its construction and development in the same fashion that it can force construction of public facilities by the development community? Why or why not?

Paying for Growth is the latest in a series of softback studies[4] dealing with the subject of impact fees and other exactions. Though clearly more regional than the others, its analyses—particularly the legal and economic—are general in nature, with national application. Its main strengths, however, are its well-written and incisive Conclusion and Commentary[5] and its illuminating, if somewhat rambling, interviews with key governmental officials[6] who will be charged with implementing impact fee and housing exaction programs in Hawaii.

This review essay comments upon *Paying for Growth* while exhaustively surveying the state of the law on impact fees and housing exaction programs. Although the chapters on planning, economics, and interviews are interesting, they do not address the legal issues raised by impact fees and housing exactions, and are therefore treated very lightly. It is the legal issues and their resolution that are critically important in states experiencing rapid growth through development, such as Hawaii.

II. Impact Fees, Housing Exactions and Paying for Growth

A. Conclusion and Commentary: The Last Should be First

Paying for Growth ends with a conclusion and summary section which should have introduced the whole report as an executive summary which is clearly needed, and for which the section is admirably suited. Aside from concisely summarizing each of the preceding chapters on planning, interviews, law and economics, the author[7] raises key points which it would have been well to consider before delving into the substantive chapters:

1. Will impact fees, as and when adopted by the four counties of Hawaii,

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197 (1988).

[4] Snyder & Stegman, *Paying for Growth*, Urb. Land. Inst. (1986); *see generally* Development Exactions (1987).

[5] Paying For Growth In Hawaii: An Analysis Of Impact Fees and Housing Exaction Programs 171-82 (D. Davidson ed. 1988) [hereinafter Paying For Growth].

[6] *Id.* at 13-86.

[7] Lawyer Dan Davidson, who is also principal editor and Director of the Land Use Research Foundation which supported the study.

take the place of the many ad hoc governmental requirements for land development,[8] many of which are unsubstantiated, randomly applied, and often illegal? As Davidson notes, most landowners would rather pay than fight, agreeing to all manner of requirements which are then often reduced to a unilateral agreement and recorded—a process meant presumably to establish rights against a reneging landowner, but which in all probability gives the community no legal leverage whatsoever.[9] Impact fees and other exactions set forth in ordinances and regulations should replace this ad hoc system with all possible deliberate speed.

2. Housing exactions programs are the achilles heel of an impact fee system from a legal perspective, and nearly indefensible from an economic perspective, in the long run.[10] Unless these conclusions are shown to be significantly in error, this does not bode well for the commitment at both county and state level in Hawaii to supplement the Governor's bellweather affordable housing production scheme[11] with the nation's most stringent affordable housing set-aside pro-

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[8] What types of exactions are encompassed by a unilateral? The following represents requirements that may be imposed depending upon the nature and the size of the development:

- *Water.* Satisfy Board of Water Supply's requirements for necessary water source, reservoir and distribution at developer's cost.
- *Sewerage.* Pay all fees, charges or assessments required for the expansion of off-site wastewater treatment facilities needed for project.
- *Parks.* Meet statutory requirements of City Park Dedication Ordinance, plus through negotiated exactions, dedicate additional land, and/or provide additional private parks.
- *Child Care.* Dedicate land or provide commercial space for child-care facility.
- *Inclusionary Housing.* Provide a percentage of units in the project for sale or for rent to households of low/moderate income. Sometimes payment of money or dedication of land in lieu of the housing set-aside have been accepted.
- *Transportation Improvements.* Various, including:
  a. Dedication of land and/or payment of fees for road widening.
  b. Signalization of intersections.
  c. Total or partial funding of freeway interchanges adjoining project.
  d. Pedestrian overpass, sometimes several miles from project.
  e. Implementation of transportation system management program, including dedication of land for park'n'ride facility.
- *Job Training.* Establish job-training program in connection with resort projects.
- *Other Dedications.* Provide land for beach access, hiking trails, school sites, government facilities such as police or fire stations, archaeological research, public parking, and wildlife sanctuaries.

PAYING FOR GROWTH, *supra* note 5, at 172-73.

[9] *Id.* at 172.

[10] *Id.* at 176-77.

[11] Governor John Waihee proposes to spend up to $120 million for raw land and another $120 million for infrastructure in order to stimulate construction of thousands of "affordable" ($90,000-$140,000) single-family homes in the Ewa district of Oahu, west of downtown Honolulu and adjacent to Pearl Harbor, as well as several thousand such units on each of the neighbor

grams.[12] The legal literature is filled with warnings and reservations about the defensibility of such set-asides, and the few cases on the subject sound an equally pessimistic tone, as discussed below in Part II-A.

B. The Legal Analysis

Of most interest to lawyers is the legal analysis chapter of *Paying for Growth* which attempts to set out the legal bases for impact fees and housing exactions.[13] Its author finds abundant support for the former, but precious little for the latter. In this he is probably right.

1. Impact Fees: The Need, The Ground Rules

The rapid growth of new development in many areas is placing a severe strain on the financial capacity of local government to fund the large capital outlays for schools, parks, roads, sewers and other facilities required by new residents. Traditional methods of funding such public facilities often prove inadequate. Customary funding of capital facilities out of general funds or bond proceeds may lead to existing residents paying more than their "fair share" of the cost of the public infrastructure built to serve new residents.[14] Assessments are often inadequate because they are usually restricted to a zone or improvement immediately adjacent to the property assessed.[15] "In-lieu" fees developed as a refinement of the now well-accepted practice of required dedication of some types of infrastructure as a condition of subdivision approval. In-lieu fees substitute a money payment for dedication when the latter is not feasible, as, for example, when a school is needed and dedication requirements based on a small proposed land development would result in an inadequate site, or one which is poorly located.

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islands of Hawaii, Maui, and Kauai. *Governor Pushes for 64,000 Affordable Homes*, Honolulu Advertiser, Feb. 5, 1988, at A3, col. 1; *see also Ewa Land Condemnation Eyed*, Honolulu Advertiser, Feb. 10, 1988, at A1, col. 1.

[12] The Office of State Planning has successfully sought conditions on State Land Use Commission approval of converting private land from agricultural to urban use (for residential development) which would require developers to "set aside" 60% of the residential units as "affordable": available to those families with incomes 80% to 120% of median - $34,000 - income. The selling price would be $80,000 - $125,000. *Condition Put On Housing Project*, Honolulu Advertiser, Nov. 17, 1987, at A3, col. 5.

[13] Kudo, *Impact Fees and Housing Exactions Programs: A Legal Analysis*, in PAYING FOR GROWTH, *supra* note 5, at 87.

[14] *See* Gilhool & Heyman, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1121 (1964).

[15] Callies, *A Hypothetical Case*, 16 URB. LAW. ANN. 155 (1979).

Impact fees have recently emerged as a more flexible method of coping with inadequate public facilities brought about by rapid growth and development. In *Contractors & Builders Association v. City of Dunedin*[16] the Florida Supreme Court grasped the financial plight of cash strapped municipalities seeking alternative sources of revenue:

> We see no reason to require that a municipality resort to deficit financing, in order to raise capital by means of utility rates and charges. On the contrary, sound public policy militates against any such inflexibility. It may be a simpler task to amortize a known outlay, than to predict population trends and the other variables necessary to arrive at an accurate forecast of future capital needs. But raising capital for future use by means of rates and charges may permit a municipality to take advantage of favorable conditions, which would alter before money could be raised through issuance of debt securities; and the day may not be far distant when municipalities cannot compete successfully with other borrowers for needed capital.[17]

Impact fees are charges collected by local governments from new land developments, to pay for a public facility constructed to benefit such new developments, which fees are no more than the costs of the facility. The fees collected are set aside, separate from general revenues.[18]

Impact fees are superior to in-lieu fees, dedications, and assessments for the following reasons:

(1) Impact fees can be used to fund types of capital facilities not usually subject to dedication requirements and fees in-lieu thereof.
(2) Since they are not tied to dedication requirements, impact fees can more easily be applied to public facilities the need for which is generated by, but located outside of, the development.
(3) Impact fees can be applied to condominiums, apartments, and commercial developments which create the need for extra-development capital expenditures, but which often escape dedication or in-lieu fee requirements.
(4) Impact fees can be collected at various stages, such as when building permits are issued, or at other times when growth creating a need for new services occurs, rather than at the time of subdivision platting, where traditional exactions and in-lieu fees are usually collected.[19]

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[16] 329 So. 2d 314, 319-20 (Fla. 1976).

[17] *Id.*

[18] Callies, *Propery Rights*, *supra* note 1, at 632; Nicholas, *Capital Improvement Finance and Impact Fees After the Growth Management Act of 1985*, in PERSPECTIVES ON FLORIDA'S GROWTH MANAGEMENT ACT OF 1985 175, 178, 188 (1986).

[19] Callies, *Property Rights*, *supra* note 1, at 632-33; Juergensmeyer, *Funding Infrastructure: Paying the Costs of Growth Through Impact Fees and Other Land Regulation Charges*, in THE CHANGING STRUCTURE OF INFRASTRUCTURE FINANCE (J. Nicholas ed. 1985) [hereinafter Juergen-

a. The Legal Tests

In assessing the validity of impact fees, courts first inquire into whether local government is authorized to impose the fee. (This issue is addressed above in subsection b.) If there is sufficient authority to impose a fee, courts commonly address the relationship between the development upon which the fee was levied and the amount and use planned for the fee. Generally, courts have used three approaches in determining the reasonableness of this relationship: (1) the "rational nexus" test, as applied by the Florida courts and the majority of other jurisdictions; (2) the more restrictive "specifically and uniquely attributable" test, as applied in Illinois; and (3) the less restrictive - indeed generous - "reasonable relationship" test, applied by the California courts.

i. The Rational Nexus Test

The rational nexus test is the most widely used standard for examining development exactions, and especially the impact fee. This test has two parts. First, the particular development must create a "need," to which the amount of the exaction bears some roughly proportional relationship. Second, the local government must demonstrate that the fees levied will actually be used for the purpose collected, by proper "earmarking" and timely expenditure of the funds.[20]

The Florida courts have adopted the rational nexus test for impact fees in a series of recent decisions, beginning with *Contractors & Builders Association v. City of Dunedin*.[21] There, the Florida Supreme Court upheld the concept of impact fees, even though it struck down the particular ordinance requiring an impact fee for sewer and water connection, for failing to sufficiently restrict the use of fees collected: "In principle, however, we see nothing wrong with transferring to the new user of a municipally owned water or sewer system a fair share of the costs new use of the system involves."[22] For an impact fee ordinance to be valid, the court held that: (1) new development must generate a need for expansion of public facilities; (2) the fees imposed must be no more than what the municipality would incur in accommodating the new users of the system; and (3) the fees must be expressly earmarked for the purposes for which they were charged.[23]

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smeyer, *Funding Infrastructure*].

[20] Bosselman & Stroud, *supra* note 2, at 397-99; Callies, *Property Rights*, *supra* note 1, at 633; Stroud, *Legal Considerations of Development Impact Fees*, 54 J. AM. PLAN. A. 29, 31 (1988).

[21] 329 So. 2d 314 (Fla. 1976).

[22] *Id.* at 317-18.

[23] *Id.*

The rational nexus test developed by the Florida courts comes from requirements set out by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*.[24] There, the court upheld an ordinance requiring a developer to dedicate land for school, park and recreation purposes, or pay an in-lieu fee of $200 per residential lot for schools and $80 per lot for park and recreation development:

> In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision.[25]

If the municipality could establish that a *group* of subdivisions over a period of years generated the need for school or park facilities to benefit the influx of new residents, then this would establish a reasonable basis for finding that the need for the exaction was occasioned by the activity of the subdivider. In this case, the municipality met the "need" portion of the rational nexus test by showing increases in both school population and village population, requiring the village to expend large sums for acquisition of park and school lands and construction of additional school facilities.

The court also upheld the reasonableness of the exactions because the public expenditures for school and park facilities greatly exceeded the amount exacted from subdividers by way of land dedication and in-lieu fees. This established a sufficient benefit to the subdivision, thus meeting another part of the rational nexus test. The court rejected the argument that residents other than those living in the subdivision would make use of the school and park facilities as immaterial.

These requirements were further refined in *Hollywood, Inc. v. Broward County*,[26] upholding an ordinance requiring dedication, an in-lieu fee, or an impact fee as a condition of plat approval, to be used for the capital costs of expanding the county park system. The court held that the ordinance was a valid exercise of the police power:

> [W]e discern the general legal principle that reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or *rational nexus*, between the need for additional capital facilities and the growth in

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[24] 28 Wis. 2d 608, 137 N.W.2d 442 (1966).

[25] *Id.* at 617, 137 N.W.2d at 447.

[26] 431 So. 2d 606 (Fla. Dist. Ct. App.), *cert. denied*, 440 So. 2d 352 (Fla. 1983).

> population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision.[27]

Seven months later, another Florida court upheld an impact fee for road improvements in *Home Builders & Contractors Association v. Board of County Commissioners*.[28] The County ordinance required new land development activity generating road traffic (including residential, commercial and industrial uses) to pay a fair share of the cost of expanding new roads attributable to the new development. The court found that the ordinance met the *Dunedin* tests for a valid impact fee because it recognized that the rapid rate of new development would require a substantial increase in the capacity of the county road system, and tied this need to the new development by a formula based on the costs of road construction and number of motor vehicle trips generated by different types of land use. Moreover, the ordinance sufficiently earmarked the funds collected for the benefit of the fee payer because expenditure of funds is localized by a zone system with separate trust funds for each zone. The court finally noted that the cost of construction of additional roads would far exceed the fees imposed on the developer by the ordinance.[29] More importantly, *Home Builders* also rejected the argument that improvements paid for by impact fees must be used exclusively *or overwhelmingly* for the benefit of those who pay: "It is difficult to envision any capital improvement for parks, sewers, drainage, roads, or whatever, which would not in some measure benefit members of the community who do not reside in or utilize the new development."[30]

These decisions show that impact fees can be a valid and effective means of coping with rapid growth, but that the courts will scrutinize such fees to ensure that they remain within reasonable limits. The Florida courts, as well as courts of other jurisdictions applying the rational nexus test, follow the modern trend of limiting exactions not by arbitrary rules regarding the nature of the facilities or the type of development, but by requiring the earmarking of funds to be used to provide *some* nonexclusive "benefit" to the development which paid the fee.[31]

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[27] 431 So. 2d at 611-12 (emphasis added).

[28] 446 So. 2d 140 (Fla. Dist. Ct. App. 1983).

[29] *Id.* at 145.

[30] *Id.* at 143.

[31] *See, e.g.*, Bosselman & Stroud, *Land Development Linkages*, *supra* note 2, at 398.

ii. *The California "Reasonable Relationship" Test as Modified by the United States Supreme Court*

As a general rule, California courts uniformly upheld (until *Nollan v. California Coastal Commission*)[32] the constitutionality of required dedication or payment of a fee as a condition of land use approval where the following conditions were met: (1) the municipality is acting within its police power; (2) the conditions have a reasonable relation to the public welfare; and (3) the municipality does not act in an arbitrary manner.

As to the first requirement, the California courts gave a broad interpretation to the police power. Rigorous land use regulations, and development exactions in particular, constitute a proper exercise of the police power. The leading California case is *Associated Home Builders v. City of Walnut Creek*:[33]

> The rationale of the cases affirming constitutionality indicate the dedication statutes are valid under the state's police power. They reason that the subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of subdivision, and in return for this benefit the city may require him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities. . . . Such exactions have been compared to admittedly valid zoning regulations such as minimum lot size and setback requirements.[34]

As to the second requirement, California courts required that exactions bear only *some* reasonable relationship to the needs created by the development. In *Walnut Creek*, the court rejected any direct or rational nexus theory, stating that an ordinance requiring dedication or in-lieu fees "can be justified on the basis of a general public need for recreational facilities caused by present and future subdivisions."[35]

This broad rationale was virtually eliminated by the United States Supreme Court in *Nollan v. California Coastal Commission*.[36] Decided on the last day of the Court's 1987 term, *Nollan* deals ostensibly with beach access. Plaintiffs sought a coastal development permit from the California Coastal Commission in order to tear down a beach house and build a bigger one. The Commission conditioned the permit on the granting of an easement to permit the public to use one-third of the property on the beach side. For the privilege of substantially upgrading a beach house, the owner was forced to dedicate to the public

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[32] 107 S. Ct. 3141 (1987).

[33] 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

[34] *Id.* at 644-45, 94 Cal. Rptr. at 639, 484 P.2d at 615.

[35] *Id.* at 638, 94 Cal. Rptr. at 634, 484 P.2d at 610.

[36] 107 S. Ct. 3141 (1987).

lateral access over much of his backyard for more beach for the public to walk upon. The California Court of Appeals had held this was a valid exercise of the Commission's police power under its statutory duty to protect the California Coast. The United States Supreme Court reversed. Noting that the taking of such an access over private property by itself would require compensation, the Court then examined whether the same requirement, imposed under the police or regulatory power of the Commission rather than under its powers of eminent domain, would modify the "just compensation" requirement.

The Court held that it did not and that compensation was required. The rationale of the Court is critical. The Court observed that land use regulations do not effect takings if they substantially advance legitimate state interests and do not deny an owner the economically viable use of his land. But even assuming (without deciding) that legitimate state interests include, in the Commission's words, protecting public views of the beach and assisting the public in overcoming the psychological barrier to the beach created by overdevelopment, the Court could not accept the Commission's position that there was a *nexus* between these interests and the condition attached to Nollan's beach house redevelopment:

> It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes.[37]

However, said the Court, it is an altogether different matter if there is an "essential nexus" between the condition (read impact fee or exaction) and what the landowner proposes to do with the property:

> Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding the construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would

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[37] *Id.* at 3149.

interfere.

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The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose into something other than what it was. The purpose becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them.[38]

In short, the Supreme Court appears to have adopted the "rational nexus" test concerning exactions, in-lieu fees and impact fees over the broader California rule which apparently affected the imposition of the condition on the Nollan property. The case also means that naked linkage programs, which seek to impose fees, dedications and conditions on the development process merely because the developer needs a permit and the public sector needs an unrelated public project, are in all probability also illegal. As one well-known commentator suggests in comments upon a proposed Chicago ordinance:

It will be difficult enough to sustain a housing linkage program on the ground that there is a reasonable relationship between the construction of commercial office space and the need for additional housing. It will be even more difficult to demonstrate that connection when the exacted payments are used for a variety of unknown neighborhood development projects.[39]

Following the lead of the *first* (and still valid) requirement of *Walnut Creek*, California courts have upheld the use of impact fees as a proper exercise of a municipality's police power. In *J.W. Jones Co. v. City of San Diego*,[40] the Court of Appeals held that San Diego could use its police power to impose "facilities benefit assessments" (FBA's) on developers in order to fund a broad spectrum of public improvements including water, sewer, roads, parks, transit and transportation, libraries, fire stations, school buildings and police stations.[41] FBA payments were earmarked for the area of benefit and solely for the purpose for

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[38] *Id.* at 3147-48.

[39] Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 28 (1987). *See also* Bosselman & Stroud, *Land Development Linkages*, *supra* note 2; Valla, *Linkage: The Next Stop in Developing Exactions*, GROWTH MGMT. STUD. NEWSL., June 1987, at 4; Kayden & Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMPT. PROBS. 127 (1987).

[40] 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (Dist. Ct. App. 1984).

[41] *Id.* at 749, 203 Cal. Rptr. at 582-83.

which the fee was levied.[42] The court rejected a challenge that the FBA's were an invalid tax, finding that the new development paying the fees was adequately benefited from the improvements since the FBA's were tied closely to the planning process. The court also examined the underlying policy of what the City was trying to do in controlling explosive growth: "The vision of San Diego's future as sketched in the general plan is attainable only through the comprehensive financing scheme contemplated by the FBA."[43]

As these decisions demonstrate, the California test grants broad discretion to municipalities in the area of development exactions. Because of the underlying rationale of development as a "privilege," developers rarely succeed in challenging fees imposed as a condition of development. The standard employed by the California courts in reviewing such fees is, however, less stringent than the rational nexus test applied by the majority of other jurisdictions.[44]

iii. The Specifically and Uniquely Attributable Test: Impact Fees Stillborn?

A shrinking minority of jurisdictions apply the specifically and uniquely attributable test, primarily in cases involving dedication and/or in-lieu fees. Illinois has in the past made the most prolific use of this test, established in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*.[45] There, a developer challenged the validity of an ordinance requiring subdividers to dedicate one acre per 60 residential lots for schools, parks, and other public purposes. The Illinois Supreme Court said:

> But because the requirement that a plat of subdivision be approved affords an appropriate point of control with respect to costs made necessary by the subdivision, it does not follow that communities may use this point of control to solve all of the problems which they can foresee.[46]

To be considered a reasonable regulation under the police power, requirements imposed upon the subdivider must be within the statutory grant of power to the municipality, and must be "specifically and uniquely attributable" to his development. The need for additional school and recreational facilities, although admittedly aggravated by the 250-unit subdivision, was not specifically and uniquely attributable to the new development and thus, should not be "cast upon the subdivider as his sole financial burden." The fact that the present

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[42] *Id.* at 749-50, 203 Cal. Rptr. at 583.

[43] *Id.* at 758, 203 Cal. Rptr. at 589.

[44] *See* Parks v. Watson, 716 F.2d 646, 653 (9th Cir. 1983).

[45] 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

[46] *Id.* at 379-80, 176 N.E.2d at 801 (quoting Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960)).

school facilities of Mount Prospect were near capacity was the result of the *total* development of the community.[47] Therefore, the dedication requirement was held to be an invalid taking without just compensation.

Rhode Island briefly adopted the *Pioneer Trust* test in *Frank Ansuini, Inc. v. City of Cranston.*[48] The court struck down a city regulation requiring subdividers to dedicate at least seven percent of the land area of the proposed plat to the city to be used for recreation purposes. It held that the involuntary dedication of land is a valid exercise of the police power only to the extent that the need for the land required to be donated results from the "specific and unique activity attributable to the developer."[49]

The New Hampshire Supreme Court recently applied the specifically and uniquely attributable test in a similar case, *J.E.D. Associates v. Town of Atkinson.*[50] The court struck down as an unconstitutional taking an ordinance requiring each subdivision developer to dedicate seven and one-half percent of their total acreage or pay a proportionate fee for playgrounds or for other town use.

By applying the restrictive *Pioneer Trust* test to developer exactions, courts imposed substantially the same requirements as a special assessment, thus effectively precluding their use for most extra-development capital funding purposes. The *Pioneer Trust* test quickly became difficult to reconcile with local governments' planning and funding problems caused by rapidly accelerating development. Consequently, state courts began turning away from this restrictive standard.[51] Indeed, both Illinois and Rhode Island appear to have abandoned it altogether.[52]

b. Authority

In analyzing the validity of impact fees and other developer exactions, many courts first inquire whether the local government has sufficient authority to impose the fee.[53] However, lack of explicit enabling legislation is rarely fatal. Most jurisdictions lack specific legislative authority for impact fees, though several have recently enacted such statutes. Most courts find authority in one or a combination of the following sources: (1) the home rule powers granted to municipalities by the state constitution; (2) state statutes empowering local governments to regulate in the general areas of zoning, planning, subdivisions, or in

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[47] *Id.* at 381, 176 N.E.2d at 802.

[48] 107 R.I. 63, 264 A.2d 910 (1970).

[49] *Id.* at 71, 264 A.2d at 914.

[50] 121 N.H. 581, 432 A.2d 12 (1981).

[51] J. Juergensmeyer, *Funding Infrastructure*, *supra* note 19.

[52] Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977).

[53] J. Juergensmeyer, *Funding Infrastructure*, *supra* note 19, at 23, 25.

specific areas like water and sewer; or (3) in a state statutes' general welfare clause.

i. Broad Interpretation of Police Power

The California courts have found authority for impact fees and exactions on developers in a broad interpretation of the home rule powers of municipalities set forth in the California Constitution. Such fees and exactions are uniformly upheld as a valid exercise of police power as long as they are "reasonable" and not arbitrary.[54] As to the police power, the California Constitution states that "a county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws."[55] The leading California case which established developer exactions as a valid exercise of a municipality's police power is *Associated Home Builders, Inc. v. City of Walnut Creek*.[56] Following the lead of *Walnut Creek*, the California courts have upheld the use of impact fees as a proper exercise of a municipality's police power.[57]

In *Amherst Builders v. City of Amherst*,[58] the Ohio Supreme Court also interpreted its state constitution broadly to find authorization for a municipality to impose "connection" fees to fund capital improvements to the city sewer system:

> It is well-settled that Section 4, Article XVIII, grants a municipality broad power to own and operate public utilities, and that a municipal sewage system is a type of "public utility" by that constitutional provision. There can be no doubt that, in order to exercise that power, a municipality must be able to impose charges upon the users of the system to defray the costs of both its construction and operation . . . . When this unimproved land is developed, the tap-in charge is imposed so that these new users will now assume a fair share of the original construction costs, thereby reimbursing the community for the previous benefit received.[59]

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[54] D. CURTIN, DEDICATIONS, EXACTIONS AND IN LIEU FEES; THE INVERSE CONDEMNATION-TAKING ISSUE (1986).

[55] CAL. CONST. art. XI, § 7.

[56] 4 Cal. 3d 633, 644-45, 94 Cal. Rptr. 630, 639, 484 P.2d 606, 615 (1971).

[57] In J.W. Jones Co. v. City of San Diego, 157 Cal. App. 3d 758, 203 Cal. Rptr. 580 (1984), the Court of Appeals held that San Diego could use its police power to impose "facilities benefit assessments" (FBA's) on developers in order to fund a broad spectrum of public improvements including water, sewer, roads, parks, transit and transportation, libraries, fire stations, school buildings and police stations.

[58] 61 Ohio St. 2d 345, 402 N.E.2d 1181 (1980).

[59] *Id.* at 347, 402 N.E.2d at 1183.

Until 1985, Florida lacked specific statutory authority for impact fees. Despite the absence of express enabling legislation, Florida courts have interpreted the home rule powers of local governments broadly in upholding their authority to impose impact fees. Home rule powers of municipalities and counties come from different sources. Municipalities receive home rule powers from the Florida Constitution: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law."[60] These home rule powers are further broadened by the Municipal Home Rule Powers Act which provides that "the Legislature recognizes that pursuant to the grant of power set forth in . . . the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act."[61]

In *Contractors & Builders Association v. City of Dunedin*,[62] the Florida Supreme Court held that a water and sewer impact fee ordinance was authorized under article VIII, section 2(b) of the state constitution, even though the court eventually struck down the ordinance on the grounds that it did not sufficiently restrict the uses of fees collected. Since no state laws existed governing impact fees for capital improvements, the municipality was free to act:

> "Under the constitution, Dunedin, as the corporate proprietor of its water and sewer systems, can exercise the powers of any other such proprietor (except as Fla. Stat. [sections 180.01-.31] or statutes enacted hereafter, may otherwise provide) . . . . Implicit in the power to provide municipal services is the power to construct, maintain and operate the necessary facilities."[63]

In granting home rule powers to *counties*, the Florida constitution differentiates between charter and non-charter counties: "Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors."[64] This delegation of powers is equivalent to the broad home rule powers granted municipalities. In *Hollywood, Inc. v. Broward County*,[65] the court held that the constitutional provision cited above authorized the county to enact an impact fee ordinance for parks:

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[60] FLA. CONST. art. VIII, § 2(b) (1968).

[61] FLA. STAT. § 166.021(3) (1979) (citing FLA. CONST. art. VIII, § 2(b) (1968)).

[62] 329 So. 2d 314 (Fla. 1976).

[63] *Id.* at 319 (quoting Coolesey v. Utilities Comm'n, 261 So. 2d 129, 130 (Fla. 1972)).

[64] FLA. CONST. art. VIII, § 1(g) (Supp. 1968).

[65] 431 So. 2d 606 (Fla. Dist. Ct. App. 1983).

> Through this provision, the people of Florida have vested broad home rule powers in charter counties such as Broward County. . . .
>
> The people have said that charter county governments shall have all the powers of local government unless the state government takes affirmative steps to preempt local legislation . . . . In the absence of preemptive federal or state statutory or constitutional law, the paramount law of a charter county is its charter.[66]

Non-charter counties, on the other hand, must find a source of enabling legislation to authorize their actions.[67] Various sources of enabling legislation have been broadly interpreted to authorize non-charter counties to enact impact fee ordinances. In *Home Builders & Contractors Association v. Board of County Commissioners*,[68] the court found authority for Palm Beach County to impose a roads impact fee in a state statute granting counties broad powers to carry on county government:

> (1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power shall include, but shall not be restricted to, the power to:
>
> . . . .
>
> (m) Provide and regulate arterial, toll, and other roads, bridges, tunnels and related facilities . . . .
>
> (w) Perform any other acts not inconsistent with law which are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.[69]

The court emphasized that "one of the legislative purposes in passing Chapter 125 was to enable local governments to govern themselves without the necessity of running to the legislature every year for authority to act."[70]

In 1985, the Florida Legislature enacted the Local Government Comprehensive Planning and Land Development Regulation Act that substantially amended the state's major land development laws and created explicit statutory authority for impact fees for the first time.[71]

ii. Implied Authority from Enabling Statutes

While not recognizing such broad home rule powers of local governments as California and Florida, other states have upheld impact fees as valid exercises of

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[66] *Id.* at 609.

[67] FLA. CONST. art. VIII, § 1(f) (Supp. 1986).

[68] 446 So. 2d 140 (Fla. Dist. Ct. App. 1983).

[69] *Id.* at 142 (quoting FLA. STAT. §§ 125.01(1)(m) & (w) (1981)).

[70] *Id.* at 143.

[71] Bosselman & Stroud, *Legal Aspects*, *supra* note 1, at 549-50.

local government authority by implication from a variety of statutory sources. In *Coulter v. City of Rawlins*,[72] the Wyoming court held that the enactment of impact fee ordinances for water and sewer was not a constitutional home rule power of the municipality and thus was subject to express legislative control. After an extensive review of the City's enabling legislation, the court found implied authority to impose impact fees for water and sewer connections. General powers granted to cities included taking any action necessary to establish, alter and regulate public water sources. In addition, zoning powers included power to enact zoning regulations to "*facilitate adequate provisions for transportation, water, sewerage, schools, parks, and other public requirements.*"[73] Another statute empowered municipalities to "take any action necessary to establish, purchase, extend, maintain and regulate a water system for supplying water to its inhabitants and for any other public purposes" and to charge rates for such services.[74] Reading all of these statutes together, the court held:

> Given the above authorities, we come to the conclusion that the Wyoming statutory provisions previously cited grant the City of Rawlins the power to levy the sewer and water connection charges . . . . Although no cited statute specifically provides that cities and towns are authorized to charge new users a certain specified fee for connecting or hooking up with the sewer and water systems, we concluded that the authority for such ordinances as those enacted by the City of Rawlins, in this case, can be fairly and necessarily implied from the powers expressly granted in the statutes.[75]

In *City of Arvada v. City of Denver*,[76] the Colorado Supreme Court held that the city was authorized to enact an ordinance imposing a "development fee" on all new users connecting into the city water system for the purposes of future development. The court looked to enabling legislation giving municipalities the power to collect from users any rates, fees, or charges for services furnished in connection with water facilities.[77] The court stated:

> While the imposition of a development fee as such is not authorized in this section, we hold that such a charge is within the general contemplation of this broadly worded statute . . . these provisions reveal that the General Assembly intended to give municipalities broad, general powers to construct, improve and extend all the facilities necessary to operate a viable water system, and that this

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[72] 662 P.2d 888, 895 (Wyo. 1983).

[73] *Id.* at 896 (emphasis in original).

[74] *Id.* at 897-98.

[75] *Id.* at 900; *see also* Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977).

[76] 663 P.2d 611 (Colo. 1983).

[77] *Id.* at 614.

power includes authorization to accumulate a fund for future development.[78]

iii. Broad Interpretation of General Welfare Clause

Other states have interpreted the general welfare clause of various state statutes as an independent source of municipal power, broad enough to confer power to enact impact fees and other developer exactions. For example, in the leading Utah case of *Call v. City of West Jordan*,[79] which upheld an ordinance requiring dedication of land or in-lieu fees for park and recreation facilities as a condition of subdivision, the court reviewed a series of statutes enabling cities to regulate for the health, safety, and general welfare and to regulate planning and subdivisions:

> If the above statutes are viewed together, and in accordance with their intent and purpose, as they should be, it seems plain enough that the ordinance in question is within the scope of authority and responsibility of the city government in the promotion of the "health, safety, morals and general welfare" of the community.[80]

The Utah Supreme Court also relied on the general welfare power of municipalities in upholding an ordinance requiring "connection fees" to defray the costs of a new sewer system. "In Utah, municipalities are granted broad powers for the protection of the health and welfare of their residents. Among these powers is the statutory authority to establish and maintain public utilities for the benefit of those residents."[81] The authority of local governments in Utah to impose impact fees is now well established. Citing *Call* and *Rupp*, the Utah Supreme Court, in *Banberry Development Corp. v. South Jordan City*,[82] stated, "These . . . decisions have resolved the legality of water connection and park improvement fees designed to raise funds to enlarge and improve sewer and water systems and recreational opportunities, as well as the legality of conditioning water hookups or plat approval on their collection."[83]

iv. Statutory Authority

Despite the general tendency of courts to find numerous grounds to uphold

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[78] *Id.* at 614-15.
[79] 606 P.2d 217 (Utah 1979).
[80] *Id.* at 219.
[81] Rupp v. Grantsville City, 610 P.2d 338, 339-40 (Utah 1980).
[82] 631 P.2d 899 (Utah 1981).
[83] *Id.* at 901.

impact fees without statutory authority, several commentators have suggested that such statutes would be useful.[84] Indeed, Texas, Florida and Illinois have enacted such statutes, in part as a result of court rulings striking down impact fees and in part in order to clarify or limit the application of impact fees to specific categories of public facilities.

The most publicized of these statutes is that of Texas.[85] Largely a reaction to Texas decisions implying that home-rule communities in Texas might have the unrestricted right to levy impact fees,[86] the statute limits the levy of impact fees to specific public improvements: water supply, treatment and distribution; wastewater collection and treatment; stormwater drainage and flood control, and certain roadway facilities.[87] The balance of the statute appears primarily directed toward limiting overreaching local governments in the levying and collection of impact fees. Thus, fees may not be levied until a local government has substantially documented the need for such fees by creating public facility service areas, making growth and land use projections therefore, calculating the cost of new and expanded facilities which will be required (carefully segregating out the repair and rehabilitation of existing facilities) and development of a conversion matrix to aid in calculating and applying fees. The fee itself is derived by dividing "service units" into capital improvement costs.[88] Funds collected must be deposited in trust funds, one each for each type of capital facility, and refunded within ten years if not spent as anticipated.[89] While assessment of the fee early in the development process is encouraged, so is late collection.[90]

While there appear to be sound arguments for authority of Illinois municipalities to adopt impact fees without specific enabling legislation,[91] the state adopted a limited authorization statute in 1987.[92] The purpose of the statute is to permit county legislative bodies in those counties within certain limited population ranges to levy transportation impact fees on new developments with

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[84] Larsen & Zimet, *Impact Fees; Et Tu, Illinois?* 21 J. MARSHALL L. REV. 489 (1988); Lillydahl, Nelson, Ramis, Rivasplata & Schell, *The Need For a Standard State Impact Fee Enabling Act*, 54 J. AM. PLAN. A. 7 (1988); T. MORGAN, THE EFFECT OF STATE LEGISLATION ON THE LAW OF IMPACT FEES, WITH SPECIAL EMPHASIS ON TEXAS LEGISLATION (1988); Taylor & McClendon, *Impact Fee Enabling Legislation: A New Approach to Exactions* 11 Zoning & Plan. Law Rep. 9 (1988).

[85] TEX. REV. CIV. STAT. ANN. art. 1269j - 4.11 (Vernon 1987).

[86] *E.g.*, City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984).

[87] TEX. REV. CIV. STAT. ANN. art. 1269j - 4.11 §1(2) (Vernon 1987).

[88] *Id.* at §§ 1(5), 1(9), 1(10), 2(d) & 2(j).

[89] *Id.* at § 5(c).

[90] *Id.* § 2(e). For general analysis of the Texas Statute, see T. MORGAN, *supra* note 84; Taylor & McClendon, *supra* note 84.

[91] Larsen & Zimet, *supra* note 84.

[92] 42 ILL. REV. STAT ch. 121, ¶ 5-608 (1987).

access (direct or indirect) to county road or state highway systems. The fee must be calculated on the bases of the estimated traffic the new development is expected to generate, together with that which is needed to maintain service. The legislation contemplates the creation of transportation districts, and the money, to be placed in special funds as collected, must be spent either in the district in which the development paying the fee is located, or in areas immediately adjacent.[93]

Both statutes are clearly limited in their application and may have the effect of foreclosing other impact fees on the ground of state preemption unless courts can be convinced of the existence of some sort of "shared power" doctrine. The potential problem is illustrated in New Jersey which has a relatively recent land development exactions statute sufficiently narrow (and narrowly interpreted by the courts in the state) that there are presently calls for enabling legislation to make impact fees legal.[94]

c. Plan Implementation

Impact fee ordinances should implement comprehensive plans. This helps insure that the ordinance ties the fees to needs generated by new development and that the planned improvements adequately benefit the development paying the fee.

A recent Arkansas decision, *City of Fayetteville v. IBI, Inc.*,[95] emphasizes this point. The court invalidated a park impact fee ordinance because the city did not have a sufficiently definite plan for parks and park facilities to justify the fee.[96] If a fee is to be collected from new development for park acquisition and/or park facilities construction, then the jurisdiction should have a plan for parks and should have a standard for park facilities against which the validity and fairness of the parks impact fee can be judged. Courts have held that a payment of a fee by a developer in exchange for plat approval for acquiring and developing county parks was a valid exercise of the police power, approving of the county park program establishing a ratio of three acres for every thousand residents and restricting the funds to be used to an area within fifteen miles from the development which paid the fees.[97]

Tying impact fees into the general plan helps insure that the court will view

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[93] *Id.*

[94] Note, *Impact Fees in New Jersey: Allocating the Cost of Land Development*, 19 RUTGERS L.J. 341 (1988).

[95] 281 Ark. 63, 659 S.W.2d 505 (1983); *see* Kaiser & Mentes, *Permissible Parameter of Park Exactions*, 65 U. DETROIT L. REV. 1, at 19-20 (1987).

[96] 281 Ark. at 67, 659 S.W.2d at 507.

[97] *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606, 607-08 (Fla. Dist. Ct. App. 1983).

the fees as valid development regulations, rather than illegal taxes. It is useful to lay the foundation for impact fees within the comprehensive plan itself and then implement them through regulatory ordinances that are consistent with the plan. Often, it is necessary to amend an existing comprehensive plan to make it a suitable basis for impact fees.[98]

In *Hillis Homes, Inc. v. Public Utility District*,[99] the Washington Supreme Court upheld a "general facilities charge" imposed for the purpose of funding capital improvements to the water system. There, the court held that the fee was authorized by statute, was not invalid as a tax, and was neither unreasonable nor discriminatory since it resulted from a classification based upon relative benefits received by each like group of customers. The general facilities charge was based on a detailed long range plan identifying facilities needed for the water system to serve anticipated new customers for the next ten years. Based on this analysis, a series of projects were identified and the cost allocated to the new customers. A separate charge was developed for each class of customer: single family, multi-family, commercial/industrial and other. The monies collected are restricted to paying for the new customers' share of the improvements, either directly to fund the construction of the improvements or indirectly to pay for the new customers' share of the debt service of the revenue bonds.[100]

On the other hand, judicial reaction to impact fees *without* such a plan (especially if the question of authority is not adequately resolved) is demonstrated by *Coronado Development Co. v. City of McPherson*.[101] The Supreme Court of Kansas held that the municipality did not have the authority to require a developer to dedicate ten percent of his total acreage or the cash equivalent for public parks. The in-lieu fees received were to be placed into a special fund restricted only for the purpose of purchasing land for public areas.[102] The court construed the zoning enabling authority narrowly because the court decided the power to regulate subdivisions did not extend to requiring the payment of an in-lieu fee that was not sufficiently earmarked. In addition, the location of the park was not mapped anywhere:

> The foregoing statute specifically grants authority to make regulations for convenient open spaces for recreation (parks and playgrounds) *in accordance with the mapped plan*. It would appear to go no further. It is not authority for a regulation requiring the developer to pay ten percent of the appraised value of the platted area to the city in the event that - as is here stipulated and conceded - there are

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[98] *See* Roberts, *Funding Public Capital Facilities: How Community Planning Can Help*, in THE CHANGING STRUCTURE OF INFRASTRUCTURE FINANCE 15-16 (J. Nicholas ed. 1985).

[99] 105 Wash. 2d 288, 714 P.2d 1163 (1986).

[100] *Id.* at 290, 714 P.2d at 1165-67.

[101] 189 Kan. 174, 368 P.2d 51 (1962).

[102] *Id.* at 174, 368 P.2d at 51-52.

> not public open spaces required by the planning commission and the governing body, within the subdivision, by any plan, mapped or otherwise . . . . Indeed, a careful analysis of the statute compels a conclusion there is nothing in any of its provisions authorizing the assessment of money as a revenue measure for *other public areas*.[103]

d. The "Uniformity" Issue and Equal Protection

An impact fee must be fairly and equitably levied among similarly situated landowners whose developments are contributing to the need for public facilities. However, courts do not require *perfect* uniformity. Thus the Supreme Court of Colorado upheld the constitutionality of a municipal ordinance imposing "facilities development fees" as a condition to connection with the sewer system. Plaintiffs, owners of apartment buildings, challenged the ordinance as an invalid tax and a violation of equal protection since it required only new customers to pay the fees. The court held that since new connections are more directly related to the need for increased capacity than old connections, there is a rational basis for the distinction made by the ordinance.[104]

The New Jersey courts have decided a line of cases upholding the validity of connection fees imposed to fund capital improvements to water and sewer systems based on equality between old and new users. The leading case establishing the validity of such fees is *Airwick Industries v. Carlstadt Sewerage Authority*.[105] There, the court upheld connection fees imposed by the Authority to pay off bonded indebtedness incurred in building a new sewer system. The court recognized that both improved and unimproved properties benefit from the increased capacity of the system:

> [T]he legislature intended that the installation and construction costs, *i.e.*, debt service charges, should in the first instance be financed by the actual users but should ultimately be borne by all the properties benefited, including the unimproved lands. For that reason there was provided a charge in the nature of a connection charge to be imposed upon unimproved properties in order that they assume a fair share of the original construction costs when they become improved properties.[106]

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[103] *Id.* at 175, 368 P.2d at 53 (emphasis added).

[104] Loup-Miller Constr. Co. v. City & County of Denver, 676 P.2d 1170, 1173-75 (Colo. 1984).

[105] 57 N.J. 107, 270 A.2d 18 (1970).

[106] *Id.* at 122, 270 A.2d at 26.

e. *Calculation of Fee*

An impact fee ordinance must connect the fee charged to needs generated by the new development and benefits conferred. Calculation of fees should be tied to a study, report, or plan based on an analysis of the new development's impact on the public facility. For example, most water and sewer impact fees are based on the amount of flowage required by a certain type of development. The analysis should demonstrate that the capital improvements planned with the funds collected are necessitated at least in part by the fee payer and that fees collected will adequately benefit the new development paying the fee.[107]

One way to show this is when the fee paid is less than the cost to the system of accommodating the new users. In *Amherst Builders Association v. City of Amherst*,[108] the schedule of fees was based on average sewage flow for various types of structures, as estimated by the Environmental Protection Agency, resulting in a fee of $400 for a single family home. In response to charges that the fee was invalid, the city introduced evidence demonstrating that the "capital cost" of each connection (the cost of facilities required to service each new user of the system) was an average of $1,186 per connection:

> While it is true that the $1 per gallon charge is not a mathematically precise estimate of the cost of service to each new user, appellant is hard-pressed to assert this as a basis for invalidating the ordinance when one considers that the resultant $400 fee is much less than the figure derived from a more precise analysis.[109]

The court also noted that, by keying the schedule to the Environmental Protection Agency guidelines, the city was attempting to make the fee of each new user proportionate to the gallons of sewage flow contributed by a particular type of structure. "Thus, the fee attempts not only to equalize the burden between present and new users, but also among the latter, depending on the burden each puts on the system."[110]

Similarly, in *Dunedin*, the Florida Supreme Court noted that the water and sewer connection fees imposed were less than the costs the city would incur in accommodating new users of its water and sewer systems, leading the court to reject characterizing the fees as taxes.[111] The court stated that "[r]aising expan-

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[107] J. NICHOLAS, AMERCIAN PLANNING ASSOCIATION, THE CALCULATION OF PROPORTIONATE-SHARE IMPACT FEES, (1988); J. Nicholas, *Flordia's Experience With Impact Fees*, in THE CHANGING STRUCTURE OF INFRASTRUCTURE FINANCE (J. Nicholas ed. 1985) [hereinafter *Florida's Experience*]; Nicholas & Nelson, *Determining the Appropriate Development Impact Fee Using the Rational Nexus Test*, 54 J. AM. PLAN. A. 56 (1988).

[108] 61 Ohio St. 2d 345, 349, 402 N.E.2d 1181, 1182 (1980).

[109] *Id.* at 352, 402 N.E.2d at 1184.

[110] *Id.*, 402 N.E.2d at 1184.

[111] Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 318 (Fla. 1976).

sion capital by setting connection charges, which do not exceed a *pro rata* share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if use of the money collected is limited to meeting the costs of expansion.*"[112]

The sewer and water "development fee" ordinances in *Milton L. Coulter v. City of Rawlins*,[113] were upheld even though the city did not demonstrate how it arrived at a fee schedule. The facts state only that the city estimated a need for $36,000.00 in capital improvements to expand the sewer and water system to meet population projections, according to a plan developed by the city.[114] However, the dissent noted that nothing in the record showed that new users were not paying all, or a disproportionate part of the capital cost of a water and sewer system for the city:

> [T]here is absolutely nothing in the record to reflect the relationship of the amount of such fees with any aspect of the annexed area . . . . The $750.00 and $1,000.00 figures seem to have been plucked out of thin air . . . . Somewhere in the scheme of this situation, we must set guidelines of reasonableness, or fairness, or uniformity. We cannot say that once a charge is called a "fee," it will have no perimeters, or fairness, or uniformity.[115]

In *Lafferty v. Payson City*,[116] an impact fee imposed partly for sewer and water was struck down by the Utah Supreme Court because the ordinance did not specify what the funds collected would be used for. The court remanded the case for a determination of the reasonableness of the fees in accordance with the test identified in its prior decision in *Banberry Development Corp. v. South Jordan City*,[117] discussed above. The court held that the municipality has the burden of disclosing the basis of its calculations to whomever challenges the reasonableness of the fees.[118]

The New Jersey enabling statutes for municipal utility authorities were amended in 1986 to provide a uniform method for calculating a permissible fair share connection fee for water and sewer systems.[119] The court quoted the senate committee report on the amendment:

> Under the uniform connection fee formula established by this bill, a connector

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[112] *Id.* at 320 (emphasis added).

[113] 662 P.2d 888 (Wyo. 1983).

[114] *Id.* at 890.

[115] *Id.* at 905 (Rooney, C.J., dissenting in part).

[116] 642 P.2d 376 (Utah 1982).

[117] 631 P.2d 899 (Utah 1981).

[118] *Id.* at 904.

[119] Meglino v. Township Comm. of Eagleswood, 103 N.J. 144, 510 A.2d 1134, 1143 (1986).

> will pay a charge based upon the actual cost of the physical connection, if made by the authority, plus a fair payment towards the cost of the system. The fair payment is to be computed by deducting from the total debt service and capital expenditures previously made by the authority the amount of all gifts, contributions or subsidies received by the authority from any federal, state or local government or private person. The remainder is then divided by the number of service units served by the system, and the results are apportioned to the connector based upon the number of service units attributed to him.
>
> The bill requires that, in attributing service units to a connector, the estimated daily flow of water or sewerage for the connector shall be divided by the average daily flow for an average single family home in the authority's district. This permits the authority to attribute a larger number of service units to a commercial building, for instance, than to a single family home.[120]

Broward County, Florida, calculates road fees using a sophisticated computer model called TRIPS (Traffic Review and Impact Planning System). There is no road impact fee schedule as such. Instead, each requested plat approval is subject to analysis by TRIPS. TRIPS performs four essential tasks: (1) it estimates the traffic impact of each development; (2) it evaluates the capacity of road segments that are likely to be impacted; (3) it estimates the cost of improvements; and (4) it calculates the development's fair share of the cost of the planned improvements.[121]

Impact fees can be computed without computers as, for example, in Palm Beach County. The Palm Beach County road impact fee system is based upon a set of data which showed that: (1) the average cost of a road was $300,000 per lane mile; (2) that traffic varied by land use types; (3) that average trip length was six miles; (4) that road capacity was 6,000 trips per day at a certain level of service.[122] In *Home Builders & Contractors Association v. Board of County Commissioners*,[123] the court stated:

> [T]he Palm Beach County ordinance in question here was crafted with *Dunedin*'s

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[120] *Id.*, 510 A.2d at 1134.

[121] Frank, *How Road Impact Fees Are Working in Broward County: The Computer Model*, PLANNING, June 1984, at 15. For detailed computation of impact fees as well as examples from many fee ordinances, see *J. Nicholas, Florida's Experience, supra* note 107.

[122] J. Nicholas, *Florida's Experience, supra* note 107 at 54. The fee for a single family home was determined to be $1,800, but was reduced to one sixth that amount or $300, for the following reasons: First, the county was receiving road revenues from the state motor fuels tax and from a road and bridge property tax, thus reducing its gross costs; second, reducing the fees allowed room for error in the formula components. Third, when the impact fee ordinance was litigated, the one-sixth fee schedule insured that the "Dunedin Test" (which requires that the fee cannot exceed the pro rata share of costs attributable to the new development) was met. *Id.* at 54-56.

[123] 446 So. 2d 140 (Fla. Dist. Ct. App. 1983).

> lessons in mind. The present ordinance recognized that the rapid rate of new development will require a substantial increase in the capacity of the county road system. The evidence shows that the cost of construction of additional roads will far exceed the fair share fees imposed by the ordinance. In fact the county suggests that under the ordinance the cost will exceed the revenue produced by eighty-five percent.[124]

The court also noted that "[t]he formula for calculating the amount of the fee is not rigid and inflexible, but rather allows the person improving the land to determine his fair share by furnishing his own independent study of traffic and economic data in order to demonstrate that his share is less than the amount under the formula set forth in the ordinance."[125] The *Home Builders* court also pointed out that the Palm Beach County ordinance avoided the defects inherent in the Broward County roads impact fee ordinance litigated in *Broward County v. Janis Development Corp.*[126] The money generated by the *Janis* ordinance far exceeded the cost of meeting the needs brought about by the new development.[127]

All Florida local governments imposing impact fees utilize a "discount" or similar reduction from net cost to encourage use of the fee schedule. The discount is designed to induce developers to pay the fees rather than incurring the expense of independent studies. The discounts also insure against violating the court imposed prohibition against charging impact fees which are greater than local governments' costs.[128]

The above cases and examples demonstrate that impact fees must be rationally related to needs generated by new development and benefits actually conferred. As the dissent in *Coulter* pointed out, the amount of fees charged cannot

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[124] *Id.* at 145.

[125] *Id.*

[126] 311 So. 2d 371 (Fla. Dist. Ct. App. 1975).

[127] 446 So. 2d at 144.

[128] J. NICHOLAS, TECHNICAL MEMORANDUM ON THE METHODS USED TO CALCULATE FRINGE AREA IMPACT FEES 4 (1986).

> Lee County, Florida, has drafted a "Fringe Area Road Impact Fee Ordinance," to impose additional impact fees on outlying areas. Draft of An Ordinance Providing for the Imposition of an Impact Fee on Land Development in the Fringe Area of Lee County for Providing New Roads and Related Facilities in the Fringe Area which are Necessitated by Such New Development (Aug. 27, 1986) (Lee County, Fla.). The Lee County Plan does not provide for any public facilities to fringe areas; rather, development is allowed in these areas only if the development provides all necessary public support facilities itself. However, experience revealed that attempting to require each development, on its own, to be self-sustaining has many complications. Thus, the county developed fringe area impact fees, which are imposed in addition to the existing impact fees and have the objective of attaining the self-sufficiency for fringe area developments required by the county plan.

Id. at 1-2.

be simply "plucked out of thin air."[129] Calculation of fees should be tied to an analysis of needs and benefits to insure that fees charged satisfy the rational nexus test.

f. Segregation, Use and Refund of Funds: Avoidance of "Tax"

Segregating fees collected into separate accounts apart from general funds meets the requirement that capital improvements or public facilities funded must "adequately" benefit the new development which paid the fee. In *Home Builders & Contractors Association v. Board of County Commissioners*,[130] the court held that benefits accruing to the community generally do not adversely affect the validity of a development regulation as long as the fee does not exceed the cost of the improvements serving the new development and the improvements *adequately* benefit the development which is the source of the fee: "It is difficult to envision any capital improvement for parks, sewers, drainage, roads, or whatever, which would not in some measure benefit members of the community who do not reside in or utilize the new development."[131] Earlier, *Amherst Builders Association v. City of Amherst*,[132] upheld a sewer tap-in charge, requiring the fees to be placed into a sewer fund, apart from general revenues.[133]

Dividing a local government into impact fee districts, depending upon the public facility or capital improvement, "localizes" the benefit, ensuring that capital improvements or public facilities funded "adequately" benefit the new development which paid the fee, even if the community at large also benefits.[134]

Many impact fee ordinances and model ordinances—especially in Florida—divided their local government territory into "impact fee districts" or "zones of benefit." A draft Charlotte County impact fee ordinance divides the county into three zones. Sarasota County's road and park impact fee ordinance

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[129] 662 P.2d 888, 905 (Wyo. 1983) (Rooney, C.J., dissenting & concurring in part).

[130] 446 So. 2d at 140.

[131] *Id.* at 143.

[132] 61 Ohio St. 2d 345, 348, 402 N.E.2d 1181, 1184 (1980).

[133] In Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983), the court held: "The limitation on this power is the requirement that any fees collected in lieu of raw-land dedication must be earmarked to accounts for the purpose of acquiring needed park and maintenance of existing park facilities." *Id.* at 903.

The *Amherst* court distinguished an earlier case, State *ex rel.* Waterbury Dev. Co. v. Witten, 54 Ohio St. 2d 412, 377 N.E.2d 505 (1978), which struck down a water connection fee as a tax because the ordinance did not provide for earmarking of the funds: "The fees collected pursuant to Ordinance 913.07 are earmarked specifically for a Sewer Revenue Fund, while the tap-in fees in *Waterbury* were not so earmarked for use." *Amherst*, 61 Ohio St. 2d at 347 n.2, 402 N.E.2d at 1183 n.2.

[134] Juregensmeyer, *Funding Infrastructure*, *supra* note 19, at 41.

has two zones. A draft of Lee County road impact fee ordinance has twelve zones and its park impact fee ordinance has fifteen zones. The Florida court in *Home Builders* approved of segregating funds into forty zones, thereby localizing the benefit, but did not explicitly require such a system.[135] Similarly, in *Hollywood, Inc. v. Broward County*,[136] the court upheld a condition to plat approval to dedicate land, pay an in-lieu fee or an impact fee to acquire more parks, favoring a restriction that the fees collected would be used for acquiring and developing new park lands within fifteen miles of the development which paid the fee.

Commingling the fees collected with general revenues has usually led courts to strike down impact fee ordinances as unauthorized taxes. In the leading case of *Contractors & Builders Association v. City of Dunedin*,[137] the Florida Supreme Court upheld the concept of impact fees, but eventually struck down the fee for sewer and water connection for failing to sufficiently restrict the funds.[138] A $720 impact fee for water connection met the same fate as the Ohio Supreme Court held in *State ex rel. Waterbury Development Co. v. Witten*[139] the ordinance was an illegal tax, after noting that fees collected were not earmarked. Similarly, the court in *Lafferty v. Payson City*,[140] struck down a $1,000 impact fee per family dwelling unit tied to the issuance of a building permit on the grounds that: "[An] impact fee deposited in the City's general revenues in this case is an illegal tax."[141]

A refund provision in an impact fee ordinance helps to ensure that the benefit requirement of the rational nexus test is met. Such a provision commonly provides that the fee payer is entitled to have fees returned if they are not spent for the purpose for which they were collected within a reasonable period of time after their collection. The reasonableness of the time period should probably be tied to the capital funding planning period for the infrastructure in question.[142]

The roads impact fee ordinance in *Home Builders* contained a provision that funds collected "must be spent within a reasonable time after collection (not later than six years) or returned to the present owner of the property."[143] In *City of Fayetteville v. IBI, Inc.*,[144] the Arkansas Supreme Court struck down an

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[135] Bosselman & Stroud, *Legal Aspects*, *supra* note 1, at 549.

[136] 431 So. 2d 606, 612 (Fla. Dist. Ct. App. 1983).

[137] 329 So. 2d 314 (Fla. 1976).

[138] *Id.* at 321.

[139] 54 Ohio St. 2d 412, 413, 377 N.E.2d 505, 506 (1978).

[140] 642 P.2d 376 (Utah 1982).

[141] *Id.* at 378 (footnote omitted).

[142] Jurgensmeyer, *Funding Infrastructure*, *supra* note 19, at 41-42.

[143] Home Builders v. Board of Palm Beach County Comm'rs, 446 So. 2d 140, 142 (Fla. Dist. Ct. App. 1983).

[144] 280 Ark. 484, 486, 659 S.W.2d 505, 506 (1983).

ordinance requiring all developers of new residential subdivisions to dedicate land or pay a fee to be used for acquisition or development of parks in the vicinity. The ordinance was struck down because (1) there was insufficient planning for expenditure of the funds, and (2) "no provision for a refund to the contributor even if the residential area should never be developed as expected."[145]

A road impact fee was struck down as a tax in *Broward County v. Janis Development*,[146] when the court held:

> The fee here is simply an exaction of money to be put in trust for roads, which must be paid before developers may build. There are no other requirements. There are no specifics provided in the ordinance as to where *and when* these monies are to be expended . . . . The fee being a tax, then it is improper.[147]

Although a trifle long on the issue of authority (which is not a major issue in most cases) the LURF Report Legal Analysis chapter sets out some of the aforementioned major cases[148] and principle basis for evaluating the legality of an impact fee (the rational nexus test):[149] there must be a reasonable connection between the fee charged and a development-generated problem which the fee will help alleviate.[150] The chapter also discusses the less-used "general public needs" test and the virtually unused "specifically and uniquely attributable" test.[151] The author reaches these tests by means of a rather superficial treatment of the so-called "takings" issue[152] (a regulation of land, if it goes "too far" may be construed as a taking of property potentially leading to compensation under the fifth amendment to the federal constitution) which is of only marginal relevance,[153] even given the need to deal with the United States Supreme Court's

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[145] *Id.* at 488, 659 S.W.2d at 508.

[146] 311 So. 2d 371 (Fla. Dist. Ct. App. 1975).

[147] *Id.* at 375 (emphasis added).

[148] PAYING FOR GROWTH, *supra* note 5, at 101-10.

[149] *Id.* at 102-10.

[150] Callies, *Property Rights*, *supra* note 1, at 633; Taub, *supra* note 1.

[151] PAYING FOR GROWTH, *supra* note 5, at 101-02 (citing *Pioneer Trust*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961), and *Ayers*, 34 Cal. 2d 31, 207 P.2d 1 (1949)).

[152] *See* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Keystone Bituminous Coal Assoc. v. DeBenedictis, 107 S. Ct. 1232 (1987); First English Evangelical Lutheran Church of Glendale v. Los Angeles, 107 S. Ct. 2378 (1987); Callies, *Legal Aspects*, *supra* note 1.

[153] In the process, the author has generalized to the point of error by failing to distinguish between "facial" (*Keystone*) and "applied" (*Penn Central*) challenges to land use *ordinance* regulations made clear at the outset of land use common law at the Supreme Court level in Euclid v. Ambler Realty Corp., 272 U.S. 365 (1926) and Nectow v. City of Cambridge, 277 U.S. 183 (1927) with the result that the tests set out at page 100 are at best garbled and at worst misleading and inapplicable. The problem is accentuated by discussion of Hawaii's *Midkiff* case, which is

decision in *Nollan v. California Coastal Commission* which forms a basis for upholding exactions of all sorts, including impact fees, under a nexus test.[154] None of this—fortunately—detracts from the summary of impact fee common law, followed later by a useful summary of those few Hawaii statutes and local ordinances and charter provisions which appear to support impact fees and other exactions on the land development process, and a survey of where the various counties have gone with the impact fee concept.[155] Perhaps most useful of all is the checklist of potential drafting problems set out under the rubric, "Guidelines for Drafting a Defensible Impact Fee Ordinance."[156]

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of course not a regulatory taking case at all, but—as the Court defined it—a simple experience of the power of eminent domain, raising different issues—particularly with respect to public purpose—altogether.

[154] Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

[155] PAYING FOR GROWTH, *supra* note 5, at 116-20. The Scorecard: Maui has a limited ordinance (both geographically - in West Maui—and subjectively—only for traffic/roadways; Hawaii has a draft impact fee ordinance submitted to its Council; Kauai has an old Environmental Impact Assessment Ordinance (1980) which is a sort of catch-all measure, and Honolulu has pending before Council a Community Benefit Assessments bill which levies a general fee of *rezoning*, making it of dubious validity both because it is not *development* responsive (*rezoning* creates no new infrastructure needs, *development* does) and because it does not segregate funds into specific subject categories. The author understands that yet another draft ordinance for Honolulu is contemplated.

[156] *Id.* at 115-16: The following are guidelines which should be followed in drafting an impact fee ordinance, to best assure the validity of the ordinance from legal challenge based on state court decision in other jurisdiction and the *Nollan* decision.

1. *Incorporation of Comprehensive Plans and Capital Improvement Plans.* The ordinance should show a need for impact fees by relating the expenditure of the impact fees within the context of a capital improvement plan. The capital improvement plan should also be related to a community wide development plan. The ordinance must demonstrate that the need for additional facilities is required by new development, and not by existing deficiencies. This can be accomplished through determination of appropriate facilities standards, and formulation of a capital improvement plan to schedule improvements that will correct existing deficiencies, upgrade service levels, and accommodate new development. The cost of additional facilities must then be apportioned between new and existing development.
2. *Fees Must be Proportional to the Need Created.* The ordinance must establish the proportionate share of costs that the new development will bear. The factors which may be considered are:
   a. the cost of existing facilities;
   b. the means by which existing facilities have been financed;
   c. the extent to which new development has already contributed, through tax assessments, to the cost of providing existing excess capacity;
   d. the extent to which new development will, in the future, contribute to the cost of constructing currently existing facilities used by everyone in the community or by people who do not occupy the new development (by paying taxes in the future to pay off bonds used to build those facilities in the past);
   e. the extent to which the newly developed properties are entitled to a credit for providing facilities that the community has provided in the past without charge to

2. *Housing Exactions*

The author is considerably more skeptical with respect to the validity of

other developments in the service area;

f. extraordinary costs, if any, in serving the new development; and

g. the time-price differential inherent in fair comparisons of amounts paid at different times.

The computation of the fee will vary depending on the improvement for which the fee is assessed and the financial restraints in the community.

3. *Avoidance of Double Payment.* The factors above should assure that new development does not pay for facilities twice i.e., once through impact fees and later through taxes or vice versa. In addition, the ordinance should take into consideration other forms of exactions which may be imposed on the development, such as subdivision exactions or earlier in the zoning unilateral agreement.

4. *Creation of a Separate Fund.* The funds should be earmarked and placed into a separate fund designed for the improvement(s) for which they were collected.

5. *Fees Must be Spent to Benefit the Development.* The improvement should be located where one may reasonably expect that occupants of the new development would use the improvements. However, the improvements need not be for the exclusive use of the occupants of the new development. Palm Beach County, Florida resolves this problem by requiring that road impact fees be spent within six miles of the new development. Montgomery County and Maryland, establishes districts within which road impact fees must be spent.

6. *Fees Must be Spent Within a Reasonable Time, or Refunded.* The ordinance should address the timing of the expenditure, since courts will require that impact fees be spent within a reasonable time (e.g., 4 to 6 years from collection). Some ordinances delay collection of the fee to give more time to consolidate collection efforts for major capital improvement projects. Many impact fee ordinances in Florida also contain a refund provision, under which funds which are not expended within a specified time are refunded to the current occupant of the property.

7. *Mechanism to Challenge the Fee and Exemptions.* The ordinance should allow those who pay the fee to challenge the criteria on which the fee is based. This may be accomplished through a hearing or appeals procedure which would allow developers to present their own studies and data to support a lesser fee amount. The ordinance should contain a hardship waiver provision for those cases where assessment of the fee would leave the developer with no economically viable use of his property. Exemptions should be provided and based on non-economic criteria.

8. *Equal Application.* The ordinance should assess fees on every development that creates a need for the infrastructure similarly. Both small and large developments should be assessed fees.

9. *Fees Should Only be Used for Construction.* The fees should be used only for construction of facilities, and not for the maintenance, repair or operation of the facilities once constructed. Taxes or user fees should be utilized to cover the cost of these latter items.

10. *Time of Payment.* The time of payment of the fee should be considered. A typical scenario is to provide for the payment of the fee when the building permit is issued or at subdivision approval.

11. *Documentation of State Interest.* Finally, in response to the *Nollan* case, local governments should establish that the exaction substantially advances a legitimate state interest.

housing exactions.[157] Here, he is probably on solid ground once again. Tying the approval of land development to the dedication of low- and moderate-income housing or the payment of fees to fund the building of low- and moderate-income housing has been the most controversial exaction levied by local governments.

Two commentators trace the evolution of exactions for housing and conclude: "[T]he fact that the output is housing does not present any compelling legal reason why the tests used to evaluate other development exactions may not be applied to such [housing] programs."[158] The same commentators point out that by being too exotic certain exactions do not pass the rational nexus test:

> When the exactions related to traditional public service and facilities usually provided to new residential development, the courts have generally accepted the proposition that the new development causes some need for new facilities such as streets, sewers, water, parks and schools. Where the exaction is for some more exotic service or facility, such as the geothermal well involved in parks, the courts may conclude that no need exists and reject the validity of the exaction without going further.[159]

Whether the building of new housing causes a need for low- and moderate-income housing is far from certain. Under one theory, when commercial development and conventional market units use up a scarce resource (lands in coastal regions), which could have been used for the building of low- and moderate-income housing, they can be required to contribute to low-income housing. This could also increase the property values of adjacent properties, thus excluding low- and moderate-income households from the communities.[160]

One commentator doubts that a housing exaction meets the rational nexus test:

> [E]ven these more permissive cases [*Walnut Creek* and others] would have to be stretched quite far to justify the inclusionary zoning ordinances. They do stand for the proposition that some exactions will be upheld although the need does not

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This can be done through a recital in the preamble of the ordinance to this effect and a finding by the legislative body that this is so based on the State Constitution or prevailing state laws.

[157] *Id.* at 110-15.

[158] Bosselman & Stroud, *Land Development Linkages*, *supra* note 2, at 406.

[159] *Id.* at 398.

[160] *See In re* Egg Harbor Assocs., 94 N.J. 358, 464 A.2d 1115, 1118-19 (1983). Under a quasi-public trust doctrine, since the market forces will result in the under allocation of low- and moderate-income housing, the local government should regulate land in a way to ensure the equitable distribution among economic groups. *Cf.* Bozung, *A Positive Response to Growth Control Plans: The Orange County Inclusionary Housing Program*, 9 PEPPERDINE L. REV. 819, 822 (1982).

> arise entirely from and the benefits extend beyond the particular development. However, the causal connection between new development and the types of services involved in the subdivision cases—streets, parks and schools—seems more immediate and direct than in the case of the inclusionary ordinances.[161]

The same commentator also raised the argument that permissive subdivision exactions pose a threat to an inequitable redistribution of wealth. Even if the need for lower cost housing could be connected with the new development, it could be argued that the benefits accrue to the community rather than to the particular developments. Courts might be hard pressed to see a reciprocal benefit to having lower cost or subsidized housing interspersed within the new development.

Municipalities have taken alternative paths in trying to cope with the problem that an increasing proportion of the population cannot afford adequate housing. Critics of traditional zoning point to its exclusionary effect. Minimum lot size, setbacks and front yard requirements contribute to the high cost of housing. In addition, many communities have residential districts zoned only for single family dwellings. These zoning regulations may offend notions of distributive justice. It has been well-argued that since the demand for affordable housing by low- and moderate-income households greatly exceeds the supply and has a disproportionate impact upon minorities by excluding them from certain communities and contributing to the economic segregation of ethnic groups, municipalities should change zoning laws to foster the production of all alternatives of housing for all ethnic and economic groups.[162]

The first method by which municipalities encourage the production of low- and moderate-income housing is through mandatory set-asides. These require residential developers to provide a certain percentage of their units below the market price be rented or sold to low- and moderate-income families.[163]

The second method is through linkage programs. Linkages involve conditioning approval of commercial development, like a downtown office building, upon a landowner's contributing to the construction of new housing.[164]

How courts have treated mandatory set-asides is generally beyond the scope of this essay. Suffice it to say that a heavily criticized and largely ignored decision from Virginia struck the concept down[165] and a pair of much-heralded New Jersey decisions has upheld them, though in relatively unique

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[161] Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432, 1498 (1974).

[162] Bozung, *supra* note 160, at 819-21.

[163] Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1015-16 (1976).

[164] Bosselman & Stroud, *Land Development Linkages*, *supra* note 2.

[165] Board of Supervisors v. DeGroff Enters., Inc., 214 Va. 235, 198 S.E.2d 600 (1973).

circumstances.[166]

So far, the only jurisdiction to have squarely addressed the use of linkage fees for such housing has done so only at the trial court level, which issue was then neatly avoided on procedural grounds on appeal. A recent Massachusetts case, *Bonan v. City of Boston*,[167] presented an opportunity to settle the issue of whether linkages and mandatory set-asides could be sustained under a rational nexus analysis applied to other types of exactions. However, the Massachusetts Supreme Judicial Court resolved the cases on procedural grounds without addressing the substantive issues.[168]

In *Bonan*, the zoning commission of Boston granted Massachusetts General Hospital a special exception, amending the zoning map to permit a greater building density for the property than otherwise permitted by the zoning code. The exception was contingent upon a payment of a Development Impact Project Exaction of five dollars for each square foot of gross floor area in the project in excess of 100,000 square feet.[169] The plaintiffs, owners of an adjacent property, maintained that they would be injured by the increased traffic, parking, people and loss of their view of the Charles River and the City of Cambridge.

The trial court rejected any purported linkage. According to the court, the powers listed in the zoning enabling act do:

> not include the power to exact a fee, a tax, or an in-kind contribution for the construction of low- and moderate-income housing as a condition of the granting of an amendment to the zoning map. . . . [Nor could the power be implied.] From this silence, the court must conclude that the power to exact linkage fees is not within the scope of the zoning power.[170]

Also, the court reasoned the nearly $4 million generated by the exaction was more like a tax than a fee since the benefits accrue to the community at large rather than the payer.[171]

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[166] Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) where such set asides were required of recalcitrant local governments—not developers—only after a host of other measures such as eliminating design and non-health requirements like curbs and sidewalks and permitting mobile homes, to increase the supply of low-income housing, are tried and fail, and *In re* Egg Harbor Assocs., 94 N.J. 358, 464 A.2d 1115 (1983) where the approved development would take up virtually all the developable land in the coastal zone in the region thereby eliminating any low-income housing there without a set-aside.

[167] 398 Mass. 315, 496 N.E.2d 640 (1986).

[168] Letter from Donald L. Connors to James C. Nicholas (Sept. 29, 1986) (summarizing the holding in *Bonan* that the plaintiffs lacked standing to sue); Memorandum from Donald L. Connors to Persons Interested in Boston's Linkage Ordinance (May 1, 1986).

[169] 398 Mass. at 318-19, 496 N.E.2d at 642-43.

[170] Bonan v. City of Boston, No. 76438, slip op. at 17 (Mass. Super. Ct. Mar. 31, 1986).

[171] *Id.* at 19.

This holding became moot when the Massachusetts Supreme Court held that the plaintiffs lacked standing to sue.[172]

Two commentators cautiously predict that linkage programs will be upheld under the rational nexus test.[173] They recognize that the key issue is whether commercial development causes the need for new housing. Linkage programs are justified by the argument that new commercial development creates jobs. This attracts new residents to the area, increasing the demand for housing which increases the price of housing, creating a need for low- and moderate-income housing. A San Francisco economist argues that "additions to the supply of office space don't make office employment any more than cribs make babies."[174] Even if the proposition that new development creates new jobs is accepted, it does not necessarily follow that such development generates a demand for new housing. The cities are in a state of flux. Birth rates, death rates and migration might even lower the demand for housing. Moreover, the housing stock is in constant flux as units are being constantly built, demolished or converted to nonresidential use. Although the proof of causation to validate linkage is not insurmountable, it will take careful documentation by the cities that intend to adopt housing linkage programs.[175]

On the other hand, the San Francisco housing linkage program has been ably defended on the grounds of housing mitigation: the need for housing for office workers who will be employed in new office buildings.[176] The theory goes that while the supply of housing in San Francisco will expand, it will not expand enough to provide housing for office workers on a market basis without government intervention. Otherwise, those with the greater incomes will be housed as competition for increasingly short supplies heats up. The linkage fee is derived from calculating how many jobs new office development will generate and how many workers will be there employed who cannot be expected to find housing in San Francisco.[177]

Dealing mainly with recent linkage programs in Boston and San Francisco, *Planning for Growth* concludes that despite the virtual dearth of appellate cases dealing with such linkage programs, there is little legal basis for them, particularly when the requirement to provide housing is tied to a proposed residential development. These are not clearly distinguished in this chapter from the so-called "voluntary" programs noted in the same category as if they are the same, in which a developer is provided with density or other construction and devel-

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[172] Bonan v. City of Boston, 398 Mass. 315, 320-21, 496 N.E.2d, 640, 645 (1986).

[173] Bosselman & Stroud, *Land Development Linkages*, *supra* note 2, at 411.

[174] *Id.* at 407.

[175] *See id.* at 407-09.

[176] Hausrath, *Economic Basis for Linking Jobs and Housing in San Francisco*, 54 J. AM. PLAN. A. 210 (1988).

[177] *Id.* at 212-13.

opment bonuses if certain percentages of affordable housing are constructed. There is obviously some choice inherent in the former, whereas there is none in the latter. The chapter concludes—as does the conclusion later—that raw linkage without any attempt at forming a nexus between the housing demanded and the development from which demanded, is in all likelihood legally flawed. The discussion which follows attempts to differentiate so-called inclusionary zoning, citing primarily the line of cases from New Jersey which appear to require such housing to be built in developing communities.[178] It is worth noting, however, that these cases arose when recalcitrant communities (not leery developers as in Hawaii) failed to take their fair share of low-income residents fleeing central cities. Moreover, the requirement that these communities require mandatory construction of low-income housing as part of other residential developments applied only to those communities which: (1) were "developing" and (2) had undertaken a plethora of other measures first to attempt to provide low-income housing, specifically such as permitting mobile homes and stripping their existing ordinances of none—health and safety requirements which drove up the cost of housing—like curbs, sidewalks, and so forth. The chapter concludes with a cautionary note that it should not be assumed these are applicable to Hawaii.

B. The Interviews

In early 1988 the authors interviewed state and county planning directors and other officials whose responsibilities would include providing infrastructure and housing through the land development process.[179] While it is possible to criticize devoting nearly half the report to responses to a common set of questions "in their entirety"[180] and wholly without editing, some of those responses are illuminating, showing as they do a common dedication to construct both infrastructure and public housing largely at the expense of the private sector by charges on the land development process.[181] Nowhere is the failure of tradi-

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[178] *Mt. Laurel*, 93 N.J. 158, 456 A.2d 390 (1983); *Egg Harbor*, 94 N.J. 358, 464 A.2d 1115 (1983).

[179] Harold S. Masumoto, Director, Office of State Planning; Joseph K. Conant, Executive Director, State Housing Finance & Development Corporation; Donald A. Clegg, Chief Planning Officer, City & County of Honolulu; John P. Whalen, Director of Land Utilization, City & County of Honolulu; Michael Moon, Director of Housing & Community Development, City & County of Honolulu; Christopher L. Hart, Director of Planning, County of Maui; Albert Lono Lyman, Director of Planning, County of Hawaii; Tom Shigemoto, Director of Planning, County of Kauai; *Foreward* to PAYING FOR GROWTH, *supra* note 5.

[180] PAYING FOR GROWTH, *supra* note 5, at 15-86.

[181] *Id.* at 36, 38-42 (Donald Clegg); *id.* at 68, 71 (Christopher Hart); *id.* at 77 (Albert Lyman); *id.* at 82, 85 (Tom Shigemoto).

tional sources of revenue—the property tax, the excise tax, and so forth—more evident. And nowhere is it more freely admitted that exactions for housing and infrastructure have been traditionally exacted for quite some time on an ad hoc basis.[182]

What the impact fees and housing exactions formally proposed and in place would do is regularize the process adding certainty to development cost projection where little exists today.[183] What disagreement there is generally revolves around who should make the exaction, particularly for housing: the state or the counties?[184]

C. *Planning and Economics*

The brief introductory chapter on planning[185] sets the tone of the study nicely. It lists key definitions[186] together with a concise history of development regulations before fixing on the impact fee and the critical requirements of "rational nexus."[187]

A useful example of how such an impact fee would be calculated, taken from Broward County, Florida, then follows.[188]

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[182] *Id.* at 24 (Harold Masumoto); *id.* at 52 (John Whalen); *id.* at 59 (Michael Moon).

[183] *Id.* at 31 (Joseph Conant); *id.* at 49 (John Whalen).

[184] *Id.* at 41 (Donald Clegg); *id.* at 25 (Harold Matsumoto); *id.* at 54 (John Whalen); *id.* at 66 (Christopher Hart).

[185] Rae, *Impact Fees and Housing Exactions Programs: A Planning Overview*, in PAYING FOR GROWTH, *supra* note 5, at 1.

[186] *Impact Fees*: Single payments required to be made by builders or developers at the time of development approval, and calculated to be the development's proportionate share of the capital cost of providing major facilities. Because they are single payments, as opposed to periodic payments such as taxes, it means that the capital outlay necessary to construct the facility or improvement is available at the time the facility is needed. Additionally, because the fee is based on a proportionate share, new development will not be required to pay other than its own way.

Nexus: Some courts discuss a "rational nexus," while others look to an "essential nexus." From a planning perspective, what is important is that there is a clear and documented connection or link between the impacts caused by a development project and the exactions imposed upon the developer to mitigate negative impacts. PAYING FOR GROWTH, *supra* note 5, at 2.

[187] *Id.* at 4.

[188] A general formula can be shown for calculating an impact fee for a given facility. An example of a park impact fee from Broward County, Florida is provided, which is designed to incorporate planning, legal, and economic considerations. The formula has three basic components, as shown below:

1. Total cost of park development per dwelling unit. The first step is to determine what the county's standards are for parks. In this example, there is a standard of 7.5 acres of park for every 1,000 people. Second, the average household size in Broward is 2.5 persons per unit. Third, it costs Broward County $38,140 for acquisition and development of each acre of park. Given these facts, the total cost per unit of new development can then be calculated as follows:

There then follows a brief discussion of inclusionary zoning and housing linkage programs. The author concludes generally that neither may be the most productive means for increasing the amount of low-income housing available in Hawaii.[189] In sum, this chapter is well-organized and concise.

The economics chapter is tough sledding.[190] The author analyzes the concepts of impact fees and development exactions according to several economic theories and concludes that impact fees may theoretically represent a more equitable mechanism of providing for necessary public infrastructure than ad hoc exactions, but they are likely to increase the costs of both rental and market housing in the process. However, apparently not all subject areas are amenable to impact fee treatment. The most salient deviation apparently occurs in the use of fees or exactions to provide for low-income housing. They have "no social merit and should be abandoned"[191] since they have truly pernicious effects on the supply and price of low-income housing. Rather, suggests the author, more efficient

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$38,140 x 7.5 = $286,050 per 1,000 residents.
$286,050/1,000 = $286.05 per person
2.5 x $286.05 = $715.13

The cost of park development per residential unit = $715.13

2. Determine other revenue sources that contribute to park development. The function of this step is to acknowledge that there are other sources of revenue for the park development than the impact fee. These must be taken into account so that the impact fee reflects real costs to government. Such revenues typically come from State and Federal grants, previously collected property taxes on undeveloped land, and future payments of new residents to existing obligation bonds. In Broward County, it was found that State and Federal grants paid for 25% of park costs. There was also an outstanding obligation bond for parks. It was calculated that undeveloped land was paying 10% of the bond debt service through property taxes. Thus the land will have already paid 10% of its park cost. It was further found that a new home will pay $25 per year for the next 20 years toward park bond issues. Revenues can then be calculated as follows:

- 25% of $715.13 = $178.78 (Federal and State grants)
- 10% of $715.13 = $71.51 (portion paid by undeveloped land)
- Present value of $25 per year for 20 year = $264.75 (future bond payments by a new house)
- Contribution of other sources to park development = $515.04.

3. Amount of impact fee. The impact fee per new dwelling can then be calculated by subtracting other revenue sources from the cost of providing the service.

In the park example, this is:

Park cost per dwelling	$715.13
Less other revenues	515.04
Impact fee per dwelling =	$199.99

Id. at 16.

[189] *Id.* at 9-10.

[190] PAYING FOR GROWTH, *supra* note 5, ch. 4.

[191] Rose, *Impact Fees and Housing Exaction Programs: An Economic Analysis*, in PAYING FOR GROWTH, *supra* note 5, at 137.

and equitable means are available to achieve housing objectives, such as relaxing zoning and permitting restrictions (supply-side restraints) and providing housing vouchers for low-income tenants and time-phased income tax credits for first-time moderate income home buyers.[192]

These are incisive conclusions, and they are amply documented in the analysis portion of the chapter. That analysis is complex, however, and the author has thoughtfully provided the less venturesome reader with an executive summary which, while requiring the reader to accept the conclusions at face value, has the virtue of simplicity and clarity.

III. CONCLUSION

In conclusion, the legal trends across the country clearly favor the upholding of impact fees which:

1. are designed to help pay for public projects the need for which is generated by the development upon which the fee is levied;
2. are segregated from general funds and placed in a designated special fund to pay for the public project for which levied;
3. are used promptly for such projects and not held for years.

It is useful, but not necessary, for such fees to be:

1. related to plans and studies showing the need for such public projects and their relation to anticipated development;
2. part of a funding program for capital facilities in which there is a substantial public contribution from other sources of funds;
3. spent for public projects which have more, rather than less, direct connection to the development upon which fees are being levied.

In other words, courts are concerned that the fee be reasonably arrived at (mathematical precision is not required, however) and that the paying development be benefited in some manner, though neither substantial public benefit nor relatively minor development benefit will render an impact fee illegal, as the cases in California and Florida—two developing states which make substantial use of such fees and in which there has been substantial litigation—clearly indicate.

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[192] *Id.* at 141.